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No. 02-1692

In The Supreme Court of the United States

KAREN MOORE, DERRICK K. NICHOLS, SHAWNYA FRANK, GEORGE JAMES, EUGENE PAGE, MARY ANN FRYE, AND LISA A. GREENE,

Petitioners,

v.

HANNON FOOD SERVICE, INC., HANNON'S FOOD SERVICE, INC., HANNON'S FOOD SERVICE OF JACKSON, INC., AND HANNON'S FOOD SERVICE OF NATCHEZ, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether the court of appeals correctly held that on the facts of this case the window of correction provision of the Fair Labor Standards Act regulation, 29 C.F.R. § 541.118(a)(6), unambiguously allows an employer to correct a deduction timing error and maintain the overtime exempt status of managers, in view of this Court's holding in *Auer v. Robbins*, 519 U.S. 452 (1997) that "the plain language of the regulation sets out 'inadverten[ce]' and 'made for reasons other than lack of work' as *alternative* grounds permitting corrective action." 519 U.S. at 463 (emphasis in original).

CORPORATE DISCLOSURE STATEMENT

Hannon's Food Service, Inc.; Hannon's Food Service of Jackson, Inc.; and Hannon's Food Service of Natchez, Inc. are privately held Mississippi corporations. No shares are owned by parent or publicly held companies.

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THIS CASE DOES NOT MEET THIS COURT'S STANDARDS FOR DISCRETIONARY REVIEW BY WRIT OF CERTIORARI.

29 C.F.R. § 541.118(a)(6) unambiguously permits correction by employers who erroneously make deductions from employees' pay for any reason other than lack of work. Employers retain the exempt status of those employees by promising to comply with the Fair Labor Standards Act in the future and repaying the employees for the deductions.

For a period of four months, this employer erroneously deducted cash register shortages totaling $474.87 from its managers' weekly salaries (which is not permitted by the FLSA) rather than deducting the shortages from the managers' monthly bonuses (which is permitted). After learning it was not allowed to make the deductions weekly, the employer resumed compliance with the FLSA.

The facts of this case fall squarely within the regulation as previously examined by this Court in *Auer v. Robbins*, 519 U.S. 452 (1997). "What we have here is an intensely fact-specific case in which the court below unquestionably applied the correct rule of law and did not unquestionably err—precisely the type of case in which [this Court is] *most* inclined to deny certiorari." *Kyles v. Whitley*, 514 U.S. 419, 460 (1995) (Scalia, J., dissenting; emphasis in original). The same must be said of this case. The law is clear. The facts are unique. Certiorari should be denied.

THIS FACT-SPECIFIC CASE DOES NOT WARRANT DISCRETIONARY REVIEW.

The window of correction regulation, 29 C.F.R. § 541.118(a)(6), begins with the statement that the effect of making impermissible deductions depends on the facts of each case. The specific facts of this case support the decision below allowing the correction.

In this case, the managers never lost any money which would not have been lawfully deducted from their pay anyway. The money was merely deducted sooner—from weekly salaries (which the FLSA does not permit) rather than from monthly bonuses (which the FLSA does permit).

Hannon, the employer, utilized this erroneous deduction timing for only four months. It discontinued this method when counsel informed Hannon that deductions could be made from bonus but not salary. Before trial Hannon reimbursed the managers the erroneously deducted amounts. Nothing in the record supports any suggestion that Hannon knowingly violated the FLSA during the four months it mistakenly deducted shortages from salary rather than bonus.

The window of correction regulation provides that if improper deductions are inadvertently made or are made for reasons other than lack of work, the exemption is not lost if the employer reimburses the employee and promises to comply in the future. Hannon had been in compliance with the FLSA for years before the four-month period in dispute. Hannon resumed compliance immediately upon being informed by counsel that, strange as it may seem, making the deductions weekly rather than monthly would

make a difference. Hannon repaid the disputed amounts before trial.

No one contends Hannon made these deductions for more than four months; no one contends Hannon made any deductions for lack of work; no one contends the deductions from monthly bonus rather than weekly salary would have been improper; and no one contends Hannon knowingly violated the law. To characterize Hannon as having a "*policy and practice* of making impermissible deductions," Petition, at i. (emphasis in original), is to distort the stipulated facts upon which this case was decided below.

The petitioners apparently would make any employer ineligible for the window of correction because of a "policy and practice of making impermissible deductions" whenever that employer intentionally makes *any* deduction more than once, regardless of the duration or the amount of the deductions, and regardless of whether the "impermissible" deductions become "permissible" when made monthly rather than weekly.

The peculiar facts of this case do not require this Court to decide whether the Secretary's attempted superimposition in other cases, contrary to the notice and comment requirements of the Administrative Procedures Act, 5 U.S.C. § 553, of a general "policy and practice" restriction on the window of correction regulation, conflicts with the unambiguous wording of the regulation. The facts stipulated here show no "policy or practice" of FLSA violations by Hannon.

THIS COURT HAS PREVIOUSLY ADDRESSED THE ISSUES PRESENTED AND HAS NO REASON TO REVISIT THEM.

The FLSA regulations provide a window of correction for any deduction, other than deductions for lack of work, from an exempt employee's salary. The regulations provide no time deadline for employers to avail themselves of the window of correction. This court has already held no deadline applies. *Auer*, 519 U.S. at 463-64 ("[I]n petitioners' view, reimbursement must be made immediately upon the discovery that an improper deduction was made. The language of the regulation, however, does not address the timing of reimbursement, and the Secretary's *amicus* brief informs us that he does not interpret it to require immediate payment.")

In *Auer*, the employer still had not corrected the error by the time of the decision on appeal. In our case, in contrast, Hannon corrected the error before trial. The central issue in *Auer* was whether public employers could deduct from their employees' salaries for disciplinary infractions when such deductions clearly violate the no-docking rule of 29 C.F.R. § 541.118(a). This court concluded that, because the regulation makes no distinction between public and private employees, the Secretary's interpretation disallowing both public and private employers from making disciplinary deductions made sense.

An agency's sensible interpretations of its own ambiguous regulations are one thing; an agency's nonsensical interpretations of its own unambiguous regulations are quite another. An interpretation of even an ambiguous regulation which is "'plainly erroneous' or inconsistent with the regulation" carries no weight. *Auer*, 519 U.S. at 461. An interpretation of an unambiguous regulation carries

no weight because "interpretation" loses its raison d'etre in the absence of ambiguity. *Christensen v. Harris County*, 529 U.S. 576 at 587-88 (2000).

As this Court made clear in *Auer*, "[T]he plain language of the regulation sets out 'inadverten[ce]' and 'made for reasons other than lack of work' as *alternative* grounds for permitting corrective action." *Auer*, 519 U.S. at 463 (emphasis in original). No ambiguity can be found in this "plain language of the regulation." *Id.* To "interpret" the regulation to close the window whenever an employer "has an express policy and actual practice of making deductions forbidden by the salary basis regulations," Petition, at 7, is plainly erroneous and inconsistent with the regulation.

THE CONFLICT IN THE DECISIONS OF THE COURTS OF APPEALS DOES NOT WARRANT GRANTING CERTIORARI IN THIS CASE.

The decision below is not only correct, it is perfectly consistent with the plain wording of the regulation as interpreted by this Court. The petitioner's time-honored cry of a "conflict among the courts of appeals," Petition, at 15, does not warrant granting the petition in this case.

As the petitioners correctly state, "the court of appeals in the instant case, like the similar decisions in the Third and Eleventh Circuits, believed that rejection of the Secretary's decision was compelled by this Court's decision in *Auer*." Petition, at 19. Granting certiorari in some other case from one of the other "circuits . . . [which have] expressly [and clearly erroneously] approved the Secretary's interpretation," *id.* at 8, might be appropriate. Granting certiorari to review the Fifth Circuit's manifestly correct

decision in this case would be inappropriate. The Fifth Circuit's decision in this case properly found no ambiguity because this Court had already found none exists in "the plain language of the regulation [which] sets out 'inadverten[ce]' and 'made for reasons other than lack of work' as *alternative* grounds for permitting corrective action." 519 U.S. at 463.

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

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